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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 743

BAY COUNTIES DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iv) is not yet officially reported. The Board's decision and order (R. 185-197, 52-140)[1] are reported at 154 NLRB 1598.

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[1] "R." references are to the materials contained in Volume I of the record in the court of appeals; "Tr." references are to the transcript of testimony in Volume II of the record; "G.C. Exh." refers to the General Counsel's exhibits.

JURISDICTION

The opinion of the court of appeals was issued on July 21, 1967, and a decree was entered on August 2, 1967 (Pet. App. i, viii). The petition for a writ of certiorari was filed on October 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 8(e) of the National Labor Relations Act makes it an unfair labor practice for an employer and a labor organization to enter into an "express or implied" agreement whereby such employer undertakes to "cease doing business with any other person" (a so-called "hot cargo" clause). A clause in a proposed collective bargaining agreement prohibited a signatory employer from discharging an employee for refusing to cross a picket line. The question presented is whether the Board properly concluded that such a clause was barred by Section 8(e), since it covered not only picket lines which were "primary" and lawful, but also those which were "secondary" and thus violative of the Act's secondary boycott provisions.

STATUTE INVOLVED

Section 8(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519 (29 U.S.C. 151 *et seq.*), is set forth at pp. 4-5, n. 1, of the petition.

STATEMENT

Petitioner District Council, with which petitioner locals are affiliated, negotiates area-wide collective bargaining agreements (known as the "Four Bay Counties Carpenters' Master Agreements") with several employer associations. Petitioner Chester Bartalini is Secretary of the District Council and supervises the activities of the business agents of its constitutent locals (R. 187, 56-58; Tr. 142-146).

Wilbur F. Disney operates three commonly owned businesses engaged in the sale and installation of roofing materials (R. 186, 54; Tr. 306-308). In 1956 Disney signed a Master Agreement, and, although he did not sign subsequent ones, continued until 1962 to conform his labor policies to the current Master Agreements and to make contributions to the welfare funds provided for in those contracts (R. 186-176, 57-58; Tr. 150-1-150-3, 359-361, 529).

In August 1962 a new Master Agreement was negotiated by the District Council and the employer associations. The Master Agreement contained the following clause (R. 190; G.C. Exh. 7):

> XXI-A. EMPLOYEES NOT TO BE DISCHARGED FOR RECOGNIZING AUTHORIZED LINES
>
> No employee covered hereby may be discharged by an individual employer for refusing to cross a picket line established by an International Union affiliated with the Building and Construction Trades Department of American Federation of Labor, or a Local Union thereof, which picket line has been authorized or sanctioned by the Lo-

> cal Building and Construction Trades Council having jurisdiction over the area in which the job is located and after the individual employer involved has been notified and has had an opportunity to be heard. Said notice shall be in writing and mailed to the individual employer at his address. This Section shall not apply to jurisdictional disputes.

Disney refused to conform to the terms of the new Master Agreement, and instead entered into a collective bargaining agreement with District 50 of the United Mine Workers of America (R. 187; Tr. 150-1-150-4, 245-246, 359-362).

It is undisputed that, on July 18, 1963, petitioner labor organizations began picketing Disney's premises, for the purpose of forcing Disney to sign the current Master Agreement (R. 188-189, 61, 63-65; Tr. 138-140, 335-350, 358, 353-354, 361, 429-431; see Pet. 4). This picketing led to the filing of unfair labor practices against petitioners (Pet. App. ii-iii).

The Board found that Section XXI-A of the Master Agreement was unlawful under Section 8(e) of the Act because it "extends immunity from discharge to employees refusing to cross secondary picket lines" (R. 190). Since petitioners' picketing was designed to force Disney to enter into such an agreement, the Board further found that the picketing violated Section 8(b)(4)(A).[2] The Board's order, insofar as

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[2] Section 8(b)(4)(A) of the Act makes it an unfair labor practice for a union to force or require any employer "to enter into any agreement which is prohibited by section 8(e)."

here relevant,[3] directs petitioners to cease and desist from picketing or otherwise threatening or causing a work stoppage in order to force Disney to enter into the Master Agreement containing Section XXI-A as written (Pet. App. vi).

The court of appeals agreed with the Board that Section XXI-A of the Master Agreement is unlawful under Section 8(e) since "it allows an employee to refuse to cross a secondary picket line," and accordingly enforced the Board's order (Pet. App. iii-iv).

ARGUMENT

The decision of the court of appeals is clearly correct, and there is no conflict of decisions. Review by this Court is thus not warranted.

1. Absent a contract provision, an employer, so long as he is motivated by business considerations, may permanently replace employees who are unwilling to cross a picket line with those who are willing to do so, and thereby discharge the former.[4] By

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[3] The Board found other violations of Section 8(b)(4) which are not challenged here (R. 189-190; see Pet. 5). The Board also found that another clause in the Master Agreement involving the subcontracting of work did not violate Section 8(e), for, since it was limited to work to be performed on the job site, it was privileged under the construction industry proviso to Section 8(e). (R. 191-192; see *infra*, pp. 9-10).

[4] See *Redwing Carriers*, 137 NLRB 1545, 1547, affirmed *sub nom. Teamsters Local Union No. 79* v. *National Labor Relations Board*, 325 F. 2d 1011 (C.A. D.C.), certiorari denied, 377 U.S. 905; *National Labor Relations Board* v. *L.G. Everist, Inc.*, 334 F. 2d 312, 317 (C.A. 8); cf. *National Labor Relations Board* v. *Cone Brothers Contracting Co.*, 317 F. 2d 3 (C.A. 5), certiorari denied, 375 U.S. 945.

denying or inhibiting an employer's right to replace employees who refuse to carry out their assigned duties, a picket line clause, such as the one involved here, in effect requires the employer to agree to cease doing business with the person whom the union is picketing. Such a clause thus falls within the literal prohibition of Section 8(e) (see Pet. 4-5, n. 1).

Of course, Section 8(e), and the companion Section 8(b)(4)(B), interdict only secondary and not primary agreements and activity. *National Woodwork Mfrs. Ass'n* v. *National Labor Relations Board*, 386 U.S. 612. Since refusals to cross a picket line at the premises of the employer with whom the union has a primary dispute are a normal incident of such activity,[5] a picket line clause limited to primary picket lines may properly be deemed to fall outside the purview of Section 8(e).[6] But, insofar as a picket line clause would protect refusals to cross a picket line at the premises of a neutral or secondary employer, it is subject to the prohibition of Section 8(e). "Refusal to cross that line would itself be secondary activity. To the extent that the clause would protect such refusal to cross, it would then be authorizing a secondary strike and would *pro tanto* be void under § 8(e) of the Act." *Truck Drivers Union Local No. 413* v. *National Labor Relations Board*, 334 F. 2d 539, 543 (C.A. D.C.), certiorari denied, 379 U.S. 916.

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[5] See *United Steelworkers* v. *National Labor Relations Board*, 376 U.S. 492.

[6] See *Truck Drivers Union Local No. 413* v. *National Labor Relations Board*, 334 F. 2d 539, 544-545 (C.A. D.C.), certiorari denied on other issues, 379 U.S. 916.

Since the picket line clause in this case covers any authorized "picket line established by an International Union affiliated with the Building and Construction Trades Department of American Federation of Labor, or a Local Union thereof" (*supra*, p. 3), its terms are broad enough to encompass not only primary but also secondary picket lines.[7] Accordingly, the Board and the court below properly concluded that the clause exceeded the limits of a permissible picket line provision and was thus violative of Section 8(e). Moreover, this conclusion is consistent with that reached in other cases involving the same type of clause. *Truck Drivers Union Local No. 413* v. *National Labor Relations Board*, *supra*, 334 F. 2d at 543; *Drivers, Salesmen, etc., Local Union No. 695* v. *National Labor Relations Board*, 361 F. 2d 547, 551 (C.A.D.C.); *National Labor Relations Board* v. *Lane-Coos-Curry-Douglas Counties Bldg. & Constr. Trades Council*, No. 20,783, C.A. 9, August 9, 1966 (unreported), enforcing 155 NLRB 1115.

2. Petitioners seek to distinguish the prior cases on the ground that the clauses there involved sought to protect the employees who refused to cross a picket line against both discharge and lesser forms of discipline, while the clause here, which covers only discharge, leaves the employee vulnerable to other discipline. Petitioners argue that, since Section XXI-A does not give the employee who refuses to cross a picket line a total immunity from employer discipline,

[7] By its terms the clause excepts only "jurisdictional disputes" (*supra*, p. 4).

it must follow that the clause is aimed at "protecting individual refusals, not Union-induced refusals" (Pet. 9). Upon scrutiny, it is plain that this contention lacks merit. Even if it be assumed *arguendo* that the object of the picket line clause was to protect "individual rights" and that the prior cases are thus in some respects distinguishable,[8] that object cannot be accomplished in a manner which runs afoul of the Act. Although individual employees may have a right to decide for themselves not to handle certain goods or service certain companies, their employer has the correlative right to replace them with other employees who will do that sort of work. The picket line clause here, by depriving the employer of this choice where secondary as well as primary picket lines are involved, goes beyond protection of the rights of the individual employees and compels the contracting employer to cease doing business with employers disfavored by the union. It is the policy of Section 8(e) to prohibit contractual arrangements between the union and the employer that commit the latter to such a response.

3. There is similarly no substance to petitioners' contention (Pet. 10-12) that the Board improperly applied a *per se* rule and presumed illegality in finding that the picket line clause here involved covered secondary picket lines. The terms of the clause itself

[8] After citing these cases in support of its conclusion that the Board's ruling was correct, the court of appeals stated that "[t]he critical contract language involved in the cited cases differs from that of the contract here in issue, but the purport is the same" (Pet. App. iv).

are virtually without limit and would clearly cover secondary, no less than primary, picket lines. The cases relied on by petitioners are distinguishable.[9] Nor is there any inconsistency between the Board's failure to imply a qualification in the picket line clause and its action in construing the subcontracting provision of the agreement as being limited to jobsite work even though that limitation was not expressly stated (Pet. 12).[10] The Board found that, when read

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[9] In *National Labor Relations Board* v. *News Syndicate Co.*, 365 U.S. 695, the bylaw provision in question specifically provided that "only those General Laws of the union are incorporated which are 'not in conflict with this contract or with federal or state law' "; any "rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract since it would be at war with the Act" (*id.* at 700). And, in *Local 357, Teamsters* v. *National Labor Relations Board*, 365 U.S. 667, the challenged hiring-hall provision specifically recited that an employee was eligible for referral "irrespective of whether such employee is or is not a member of the Union" (*id.* at 668); as the Court observed (*id.* at 676): "Nothing is inferable from the present hiring-hall provision except that employer and union alike sought to route 'casual employees' through the union hiring hall and required a union member who circumvented it to adhere to it."

[10] Section XIV(b), the subcontracting clause of the Master Agreement, provided in relevant part (R. 187, n. 4):

> (b) The terms and conditions of this Agreement insofar as it affects an individual employer shall apply to any subcontractor, or his subcontractors, providing services for or working under contract with such an individual employer upon work covered by this Agreement, and such subcontractor, or his subcontractors with respect

in the light of other provisions of the agreement which were limited to jobsite work, it was evident that the parties intended the subcontracting clause to be applicable only to such work, and that the evidence in the record as to its application confirmed that conclusion (R. 191-192). No similar basis exists for inferring that the parties intended to limit the picket line clause to primary picket lines.

4. Finally, there is no substance to petitioners' contention (Pet. 12) that the picketing could not be found violative of Section 8(b)(4)(A) (see note 2, *supra*), since there was no showing that either Disney or any other employer actually executed the Master Agreement with the illegal picket line clause within the six-month period of limitation on the filing of unfair labor practice charges prescribed by Section 10(b) of the Act.[11] Section 8(b)(4)(A) does not of

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to such work shall be considered as an individual employer subject to all the terms of this Agreement * * *.

Although this clause in effect barred an employer covered by the Master Agreement from subcontracting to persons who did not comply with the terms of that agreement, the Board, in the light of the circumstances set forth above, concluded that the limitation was applicable only to work to be performed on the job site. Hence, the clause was privileged under the first proviso to Section 8(e), which exempts from the ban of that section "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work * * *."

[11] Section 10(b) provides that "no complaint shall issue based upon any unfair labor practice occurring more than

necessity require a consummated agreement before activity can be unlawful under its provisions; obviously it is aimed as well at *attempts* to secure an agreement which, if executed, would violate Section 8(e). Thus, "picketing with an object of forcing Disney to enter [into] a contract containing a clause prohibited by section 8(e) * * *" (Pet. App. iii) could properly be held to constitute a violation of Section 8(b)(4)(A) without regard to whether Disney or any other employer had in fact signed such an agreement.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1967

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six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made * * *."

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 281723 390